

**IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CIVIL APPELLATE JURISDICTION**

APPEAL FROM ORDER NO. 162 OF 2001.

1. Shri Mohammad Hanif Abdul
Masjid Isane,
 2. Smt.Maryambi Abdul Rashid
Isane,
 3. Shri Abdul Rashid Abdul
Gafoor Isane.
- ... Appellants.

V/s.

1. Shri Juned Mohammad Jalal,
 2. Shri Juhur Ikbale Jalal,
 3. Shri Mohammad Husain Ibrahim
Ubhare,
 4. Shri Abdul Satar Mohammad
Ibrahim Ubhare,
 5. Smt. Fatima Ahamadsaheb Ubhare,
 6. Shri Mohammad Abdul Mohammad
Ibrahim Ubhare.
- ... Respondents.

A.V.Anturkar for the appellants.

Ms.Seema Sarnaik i/b. Ms.Swati Sawant
for the respondents.

CORAM : V.C. DAGA, J.

RESERVED ON : 24th August, 2004.

PRONOUNCED ON : 8th September 2004.

JUDGMENT :

. This Appeal is directed against the order
dated 19th January, 2001 passed below Exh.5 in
Special Civil Suit No.65 of 2000 by the Joint

Civil Judge, Senior Division, Alibaug, whereby
defendant Nos.1 to 3 or anybody claiming through
them were temporarily restrained from carrying out
the work of quarrying in the suit property in any
manner whatsoever until disposal of the suit.

The Facts :

2. The facts giving rise to the present
appeal are as under :

. The appellants herein are the original
defendant Nos.1 to 3, whereas respondents are
original plaintiff Nos.1 to 6. The property,
which is the subject matter of this litigation, is
the property bearing Gat No.341 (old Revision
Survey No.72) admeasuring about 6 Hectors 14.5
Ares situated at village Tol Budruk, taluka -
Mahad, district - Raigad (hereinafter referred to
as "suit property" for short).

3. The above suit property admittedly
belonged to one Shri Mohammad Abdul alias Gazi
Khot viz. Mohammad Ibrahim Hurjuk ("Gazi Khot"
for short). According to the appellants, there is
only one person by name Gazi Khot. However,
according to the respondents there are two persons

by this name. Be that as it may, it is not relevant for the purposes of deciding this appeal.

4. It is the contention of the appellants that said Gazi Khot by executing sale deed dated 30th March, 1934 had sold the suit property to Abdul Raheman alias Gulamsaheb Wallid Mohammad Ibrahim Hurjuk residing at Tol Budruk. Copy of the said sale deed is produced on record. It is, thus, contended by the appellants that Gazi Khot had ceased to be the owner of the suit property from the year 1934 and thereafter Gulamsaheb became owner of the suit property. The said Gulamsaheb expired in the year 1941. He had no legal heirs except Maryambi. Gulamsaheb was survived by his two sons, viz. Mohammad Ibrahim and Abdul Gafoor. It is contended that Mohammad Ibrahim is settled in Africa. Abdul Gafoor is the father of appellant No.2 - Maryambi. He has also expired, as such Maryambi is the owner of the suit property by virtue of succession. Appellant No.3 is the husband of Maryambi, the appellant No.2, whereas appellant No.1 is son of Abdul Masjid, the brother of appellant No.3. Based on these relationships appellants claim ownership to the suit property.

5. As against above, the case of the respondents, original plaintiffs is that son of Mohammad Ibrahim has got the suit property by virtue of the gift deed dated 22nd November, 1952 executed by Gazi Khot. So far as respondent Nos.1 and 2 are concerned, they claim to have purchased 1/5th share of Fatima and of Mohammad Abdulla. In this way, respondents are claiming title to the suit property. For the purposes of deciding this appeal, at this stage, it is not necessary to adjudicate upon this controversy.

6. The factual matrix reveal that on 30th August, 2000, respondents/ original plaintiffs filed Special Civil Suit No.65 of 2000 seeking direction against the defendants to remove the machineries and other instruments of quarrying from the suit property and also claimed possession thereof. Compensation in the sum of Rs.3,90,000/- along with interest thereon at the rate of 18% per annum is also claimed in the said suit with permanent injunction against the defendants not to cause any obstruction to the alleged possession of the plaintiffs over the suit property.

7. An application (Exh.5), during pendency of the suit, was moved by the respondents to pray for temporary injunction against the appellants to restrain them from making any excavation on the suit property.

8. The trial Court vide its order dated 31st August, 2000 directed appellants to maintain status-quo. The suit as well as the application (Exh.5) were contested by the appellants. It was contended by the appellants that by virtue of a registered sale-deed dated 30th March, 1934 Gazi Khot sold his right in respect of the suit property to Abdul Raheman alias Gulamsaheb. Alternatively, it was contended that Gazi Khot and Gulamsaheb were real brothers and co-owners of the suit property as partition between them did not take place. It was thus, contended that even if the gift deed is admitted to be valid, the said Gazi Khot was not having more than 1/4th share and appellant No.2 being co-owner no injunction could have been claimed or granted against her. It was further contended by the appellants that in the last 50 years Gazi Khot and plaintiffs never staked their rights nor objected to the possession of the defendants even after execution of the

alleged gift deed. It was thus contended that father and grandfather of appellant No.2, viz. Gulamsaheb became owner of the suit property by adverse possession.

9. It was also contended by the appellants that Shuddhi Patrak (Corrigendum) pertaining to the suit property was effected by the Taluka Inspector, Land Record, Mahad in collusion with the power of attorney of plaintiff No.5 as such the said Shuddhi Patrak (Corrigendum) was not binding on the appellants/ defendants.

10. Lastly, it was contended by the appellants/ defendants that since the status-quo order was operating against them they have suffered irreparable loss hence prima facie case and balance of convenience were in their favour. It was, thus, prayed that application (Exh.5) for temporary injunction be rejected.

11. The trial Court after hearing the parties, vide its order dated 19th January, 2000 was pleased to allow the said application (Exh.5), whereby appellants were temporarily restrained from carrying out the work of quarrying in the suit property in any manner until disposal of the

suit. This order is the subject matter of challenge in the this appeal.

Submissions :

12. Mr.Anturkar, learned counsel for the appellants submits that once the Consolidation Scheme has become final and conclusive and it is acted upon or implemented in respect of a particular village, then it can only be modified or amended in in conformity with the provision of section 32 of the Bombay Prevention of Fragmentation and Consolidation of Holdings Act, 1947 ("Act" for short). While amplifying his submission, Mr.Anturkar submits that so far as village Tol-Budruk, with which we are concerned, the consolidation scheme was introduced and the same has already been implemented and acted upon as such it can only be modified in accordance with the provisions of the Act. In his submission, no such modification in accordance with the provisions of the Act has been done, as such order of injunction; which has an effect of modifying the consolidation scheme is unsustainable and liable to be quashed and set aside.

13. Mr.Anturkar further submits that in the instant case no such corrigendum has been issued or, if issued, it is not in conformity with the provision of section 32. The amendment to the scheme has been proposed but factually consolidation scheme of the village in question has not been modified. It has been prepared by the Taluka Inspector of the Land Record. He further submits that under section 32 of the Act authority to issue Shuddhi Patrak (Corrigendum) is with the Settlement Commissioner and not with the Taluka Inspector. He further submits that even the Government Resolution on which the respondents are trying to rely upon only empowers the District Collector, that too, to do ministerial work like preparation of papers etc., which cannot be equated with the power to take decision to modify the scheme under the provisions of the Act.

14. Mr.Anturkar further submits that the consolidation scheme was introduced in the year 1990, whereas proposed corrigendum was prepared after 10 years, that too, contrary to the law laid down by the Division Bench of this Court in the case of **Gulabrao Bhaurao Kakade v. Nivrutti Krishna Bhilare**, 2001 (Supp.) Bom.C.R. 688. According to him, the trial Court has merely

referred to the history prior to the introduction of consolidation scheme which was completely irrelevant. In his submission, even if it is assumed that the respondents had any such alleged title to the property; that alleged right by virtue of the consolidation scheme came to an end 10 years before the allotment of the suit property to the appellants.

15. Mr.Anturkar on the question of comparative hardship, submits that the quarrying work was already in progress right from the year 1995. The suit was filed in the year 2000. The suit, thus, suffers from laches. He further urged that the source of income of the appellants is from stone quarrying as such entire livelihood of the appellants has affected in view of order of temporary injunction. Mr.Anturkar, thus, submits that the impugned order is liable to be quashed and set aside.

16. Per contra, Ms.Sarnaik, learned counsel for the respondents reiterated that respondent No.1 is the cousin brother of respondent No.2. They are near relations of other respondents. Respondent Nos.3, 4 and 6 are real brothers and respondent No.5 is sister-in-law of respondent

Nos.3, 4 and 6. The husband of respondent No.5 was real brother of respondent Nos.3, 4 and 6. Similarly, respondent Nos.3, 4 and 6 had another brother by name Abdul Raheman Mahamadi Ibrahim Ubhare.

17. According to her, the suit property was originally owned by deceased Mahammad Abdul Gazi Khot, son of Mahammad Ibrahim Hurjuk as his self acquired property, who, vide gift deed dated 22nd November, 1952 gifted the suit property to respondent Nos.3, 4 and 6 and their above two brothers. Thus the suit property was the joint property of the respondents and their brothers. In her submission, respondent Nos.1 and 2 purchased part of the suit property from respondent Nos.5 and 6.

18. Ms.Sarnaik further submits that in the year 1991 complete consolidation scheme came to be applied to village Tol-Budruk. She submits that appellant No.3 is an influential contractor having good relations with the Revenue Authorities. According to her, appellant No.3 taking advantage of the fact that the suit property which was lying unattended as almost waste land, fraudulently, managed to get an application from the father of

his wife - Maryambi to get his name introduced to
7 x 12 extract of the suit property through
Mutation Entry No.138.

19. Ms.Sarnaik further submits that on 19th
July, 2000, on being complained by respondent
No.5, Taluka Inspector, Land Records, Mahad, after
hearing the appellants, prepared one Shudhi Patrak
(Corrigendum) so as to delete the names of the
appellants. She submits that on the basis of
manipulated records, appellant No.1 got licence of
explosive on 17th January, 1995 in his name and
from that date he was doing business of stone
quarrying in the suit property. In her
submission, because of illegal quarrying work
carried out by the appellants the intrinsic value
of the suit property has been reduced which has
caused irreparable loss to the respondents. She,
thus, submits that left with no alternative the
respondents were required to file suit and claim
temporary injunction. She further submits that
the trial Court having granted injunction by a
reasoned order, this Court should not interfere
with the same in exercise of appellate powers.
She prayed for dismissal of this appeal with
costs.

Consideration :

20. Having heard rival parties at length, this appeal can be decided on narrow question based on section 32 of the Act. It is not in dispute that the consolidation scheme was introduced in respect of village known as Tol Budruk in the year 1991 and the same was implemented and acted upon. As per the provisions of the Act, unless the consolidation scheme is modified or amended, neither modification in the consolidated scheme can be ordered by any Court nor any order affecting such scheme can be passed. At this juncture, it will be useful to refer to the provision of section 32 of the Act, which reads as under:

32. Power to vary scheme on ground of error, irregularity or informality.

(1) If after a scheme has come into force it appears to the Settlement Commissioner that the scheme is defective on account of an error other than that referred to in section 31A, irregularity or informality the Settlement Commissioner shall publish a draft of such variation in the prescribed manner. The draft variation shall state every amendment proposed to be made in the scheme.

(2) Within one month of the date of publication of the draft variation any person affected thereby communicate in

writing any objection to such variation to the Settlement Commissioner.

(3) After receiving the objections under sub-section (2) the Settlement Commissioner may, after making such enquiry as he may think fit, make the variation with or without modification or may not make any variation.

(3A) If the scheme is varied under sub-section (3), a notification stating that the scheme has been varied shall be published in the Official Gazette, and the scheme so varied shall be published in the prescribed manner in the village or villages concerned.

(4) From the date of the notification stating that the scheme has been varied the variation shall take effect as if it were incorporated in the scheme.

21.

The corrigendum/ shuddhi patrak sought to

be relied upon by the respondents/ original plaintiffs at page 189 has to be issued in conformity with the provision of section 32 of the Act. It is not in dispute that the corrigendum though drafted or prepared by the Taluka Inspector, Land Records, Mahad but it has not yet been published in the Official Gazette following provision of section 32 of the Act. The power to issue such corrigendum is with the Settlement Commissioner. The Taluka Inspector has no authority even to prepare draft corrigendum. Even the Government Resolution on which the respondents sought to place reliance only empowers the District Collector and, that too, just to make

ready necessary papers i.e. to do ministerial work. Such authority cannot be equated with that of the act of taking decision in exercise of powers under section 32 of the Act. So long as the corrigendum is not issued in accordance with the provisions of the Act, the appellants/ original defendants cannot be deprived of their ownership based on consolidated scheme prepared under the Act. If that be so, impugned order passed by the trial Court is unsustainable and is liable to be quashed and set aside. So far as other contentions raised by the rival parties are concerned, it is not necessary to dwell upon the same in view of absence of any modification to the scheme as on date. Those contentions are left open.

22. In the result, impugned order is quashed and set aside. Appeal is allowed with no order as to costs.

23. The trial Court is directed to treat the suit as expedited one and proceed to decide the said suit as expeditiously as possible, at any rate, within one and half year from the date of receipt of writ of this order.
